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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Saviah Rose Winery, LLC

Serial No. 78433647

Thomas J. Hoffman for Saviah Rose Winery, LLC.

M. Catherine Faint, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Grendel, Drost and Kuhlke, Administrative Trademark
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark BIG SKY CUVÉE (in standard character form;
CUVÉE is disclaimed apart from the mark as shown) for goods
identified in the application, as amended, as "wines
selling for a retail price of greater than thirty dollars
per bottle."¹

¹ Serial No. 78433647, filed June 11, 2004. The application is
based on use in commerce under Trademark Act Section 1(a), 15

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the mark, as applied to the identified goods, so resembles the mark BIG SKY BREWING COMPANY, previously registered on the Principal Register (in standard character form; BREWING COMPANY disclaimed) for "beer,"² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

The appeal is fully briefed. Applicant initially requested an oral hearing but then withdrew the request, and no oral hearing was held. We affirm the refusal to register.

Initially, we sustain the Trademark Examining Attorney's objection (made in her appeal brief) to the evidence submitted by applicant for the first time with applicant's main appeal brief (as Exhibits 1-14). Trademark Rule 2.142(d) provides, in relevant part, that "[t]he record in the application should be complete prior

U.S.C. §1051(a), and February 21, 2004 is alleged to be the date of first use anywhere and the date of first use in commerce. The application includes a translation statement stating that CUVÉE means "blended wine." The identification of goods in the application as originally filed was "wines."

² Registration No. 2096496, issued September 16, 1997; affidavits under Sections 8 and 15 accepted and acknowledged.

to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." Exhibits 1 and 3-14 to applicant's brief consist of materials³ that were not made of record prior to appeal, and we accordingly give them no consideration. Exhibit 2 to applicant's brief is the specimen of use submitted with applicant's involved application; it is of record automatically and need not have been submitted again. Finally, we note that we have given no consideration to the numerous bare factual assertions made by applicant in its request for reconsideration and in its briefs, except to the extent that those assertions are supported by evidence properly made of record.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the

³ These include: the Section 8 specimen of use contained in the file of cited Registration No. 2096496; printouts from five Internet websites (applicant had submitted partial printouts from these websites with its Request for Reconsideration; those partial printouts are of record and shall be considered); printouts from the Office's TESS database of various third-party registrations and applications, as well as a TTABVue printout of the prosecution history of a cancellation proceeding involving the cited registration; and copies of various label approval certificates for applicant's wines and the wines of a third party.

likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to the first *du Pont* factor, i.e., whether applicant's mark, BIG SKY CUVÉE, and the cited registered mark, BIG SKY BREWING COMPANY, are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties,

it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

We find, first, that the dominant feature in the commercial impression created by both marks is the designation BIG SKY, which on this record appears to be an arbitrary term as applied to the respective goods. The other wording in the respective marks, i.e., CUVÉE and BREWING COMPANY, are generic terms which have been disclaimed; they are entitled to much less weight in our comparison of the marks. See *In re Chatam International Inc.*, *supra*; *In re National Data Corp.*, *supra*.

In terms of appearance and sound, we find that the marks are similar to the extent that both begin with BIG SKY, but dissimilar to the extent that the additional generic wording in each mark looks and sounds different. On balance, however, we find that the marks look and sound more similar than dissimilar, because the similarity which results from the presence in both marks of BIG SKY

outweighs the dissimilarity which results from the different generic wording in each mark.

In terms of connotation, the marks are dissimilar to the extent that the generic wording in each mark results in disparate meanings. However, the marks are similar in meaning to the extent that both include the designation BIG SKY. Whatever the connotation of BIG SKY, it is the same in both marks. The difference in connotation which results from the different generic wording in the marks is outweighed, we find, by the similarity in connotation which results from the presence of BIG SKY in both marks.

In terms of overall commercial impression, we again find that the marks are similar rather than dissimilar. The primary if not only source-indicating feature in each mark is the arbitrary designation BIG SKY, and the presence of different generic wording in each mark does not diminish or detract from this basic point of similarity. Although, as applicant asserts, the cited registered mark BIG SKY BREWING COMPANY looks more like a trade name than does applicant's mark BIG SKY CUVÉE, we find that this distinction is not significant enough to render the marks dissimilar when viewed in their entirety. Applicant also argues that BIG SKY BREWING COMPANY, if used solely as a trade name, would not be registrable and thus is entitled

to a narrowed scope of protection. However, a designation may serve both as a trade name and as a trademark. BIG SKY BREWING COMPANY is registered as a trademark, and applicant's arguments regarding its registrability constitute an impermissible collateral attack on the validity of the cited registration which will not be heard in this ex parte proceeding.

In short, we find that the marks, when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression, are similar rather than dissimilar. The first *du Pont* factor therefore weighs in favor of a finding of likelihood of confusion.

The second *du Pont* factor requires us to determine whether the applicant's and registrant's goods, as identified in the application and the registration, are similar or dissimilar. In making this determination, we note that it is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. It is sufficient that the goods be related in some manner, or that the circumstances surrounding their use be such that they would be likely to be encountered by

the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods.

See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Applicant's goods and registrant's goods obviously are similar to the extent that both products are alcoholic beverages. Wine and beer are different products which would not be confused for each other, but that is not the test, as noted above.

Further, the Trademark Examining Attorney has submitted four third-party registrations which include in their identifications of goods both wine and beer. Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck*

Mustard Co. Inc., 6 USPQ2d 1467 (TTAB 1988).⁴ We find that this evidence weighs in favor of a finding of likelihood of confusion under the second *du Pont* factor.

The third *du Pont* factor requires us to consider the similarity or dissimilarity of the trade channels and classes of purchasers for the goods. Because there are no trade channel limitations in either applicant's or registrant's identification of goods, we must presume that the goods, as identified, are marketed in all normal trade channels for such goods and to all normal classes of purchasers for such goods. *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

The Trademark Examining Attorney has made of record printouts from the websites of four retail liquor stores which show that these stores sell both wine and beer. We accordingly find that these products are marketed in the same trade channels and to the same classes of purchasers. Such similarity in marketing channels (aside from any similarity in manufacturing channels) weighs in favor of a

⁴ A fifth third-party registration submitted by the Trademark Examining Attorney (of the mark ESPERYA) appears to be of a house mark, which is entitled to little probative weight under *Trostel* and *Mucky Duck*. Also, applicant has submitted Internet evidence purporting to show that these registered marks are not in use in the United States as trademarks for wine and beer. However, we cannot conclude that applicant's evidence diminishes the probative value of the Trademark Examining Attorney's third-party registration evidence under *Trostel* and *Mucky Duck*.

finding of likelihood of confusion under the third *du Pont* factor. See *In re Majestic Distilling Co.*, *supra*.

The fourth *du Pont* factor requires us to consider the conditions under which the goods are purchased. Applicant has amended its identification of goods to specify that applicant's wines sell for a retail price of at least thirty dollars per bottle. Applicant argues that its wines therefore are "ultrapremium" wines which are purchased with knowledge and care by sophisticated purchasers. We cannot agree. There is no evidence of record to show that thirty dollars is an especially steep price for a bottle of wine. Moreover, we find that even at thirty dollars, a bottle of wine could be an impulse purchase made by an ordinary consumer without a great degree of care or sophistication. Certainly, some wine purchasers are knowledgeable and sophisticated, but we cannot conclude on this record that it is only those persons who would ever be in the market to purchase a thirty-dollar bottle of wine. In any event, the "beer" identified in the cited registration must be deemed to be an ordinary consumer item purchased on impulse.

In making our findings under the second, third and fourth *du Pont* factors, we are mindful of the fact that numerous cases (including recent cases from the Federal Circuit Court of Appeals, our primary reviewing court) have

found that different alcoholic beverages are related products which are sold in the same trade channels to the same classes of purchasers, including to ordinary consumers, and that confusion is likely to result if the goods were to be sold under similar marks. See, e.g., *In re Chatam International Inc.*, *supra* (beer and tequila); *In re Majestic Distilling Co.*, *supra* (malt liquor and tequila). Indeed, precedential authority of the Board specifically holds that beer and wine are related products. See *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992).

We are not persuaded by applicant's contention that *Sailerbrau* is outdated, nor its contention that the present case is distinguishable on its facts due to applicant's specification in its identification of goods of a thirty dollar per bottle minimum retail price for its wine; for the reasons discussed above, we find that this price floor is not dispositive and does not suffice to negate likelihood of confusion. Nor are we persuaded by applicant's argument that *Sailerbrau* has been superseded or is rendered less persuasive or controlling by the Board's non-precedential decision in *In re Coors Brewing Co.*, (Serial No. 75599304, July 31, 2002), in which the Board declined to find, on the record presented therein, that

wine and beer are related products.⁵ Finally, we acknowledge that the Federal Circuit, in *G.H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 129, 216 USPQ 1635 (Fed. Cir. 1990), found no likelihood of confusion in a case involving beer and champagne; however, the court's decision was based to a large degree on its finding, inter alia, that the marks at issue were sufficiently dissimilar that confusion could be avoided.

For the reasons discussed above, we find that the second, third and fourth *du Pont* factors all weigh in favor of a finding of likelihood of confusion in this case. Specifically, we find that applicant's specification of a thirty-dollar per bottle minimum retail price for its wine does not suffice to make the fourth *du Pont* factor weigh dispositively against a finding of likelihood of confusion. Applicant's goods and registrant's goods are alcoholic beverage products that would be purchased by the same ordinary consumers in the same trade channels. In these circumstances, the use of the similar BIG SKY marks at issue is likely to cause confusion as to the source, sponsorship or approval of the goods.

⁵ Nor is *Sailerbrau's* authority as precedent diminished by the fact that the Federal Circuit, in its decision on appeal in the *In re Coors Brewing Co.* case, noted in dicta that the Board had found beer and wine to be unrelated products. *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003).

Applicant has presented arguments regarding many of the remaining *du Pont* factors, but those arguments are unpersuasive and unsupported by evidence in any event. Specifically, there is no evidence of record as to the fifth *du Pont* factor (fame of the prior mark);⁶ in any event, any lack of fame of the cited registered mark is not dispositive in this *ex parte* proceeding. *In re Majestic Distilling Co., supra.* There is no evidence of record under the sixth *du Pont* factor (similar marks in use on similar goods). We note that even if the third-party registration evidence submitted by applicant with its appeal brief had been timely and properly made of record (it was not; see discussion *supra*), such third-party registrations are not evidence under the sixth *du Pont* factor. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). The apparent absence of actual confusion (under the seventh and eighth *du Pont* factors) is not particularly probative in this *ex parte* case. *In re Majestic Distilling Co., supra.* There is no evidence of record as to *du Pont* factors nine through twelve. As for the thirteenth *du Pont* factor ("any other established fact probative of the effect of use"),

⁶ Applicant's assertions regarding the cited registered mark's lack of fame are not supported by evidence.

applicant's assertions that it adopted its mark in good faith, and that its products are of high quality and therefore would not disparage the reputation of registrant's mark, even if they were proven, are not dispositive.

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that a likelihood of confusion exists. To the extent that any doubts might exist as to the correctness of this conclusion, we resolve such doubts against applicant. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, *supra*. Moreover, we reject applicant's argument that its mark should be published so that the owner of the cited registration may file a notice of opposition if it believes itself to be damaged by registration of applicant's mark. It is incumbent upon us, in this *ex parte* context, to determine whether likelihood of confusion exists. See *in re Dixie Restaurants Inc.*, *supra*.

Decision: The refusal to register is affirmed.